

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DENNIS MICKJALE POTTS,
Petitioner,

vs.

JEFFREY BEARD, Secretary,
Respondent.

Civil No. 13-0568 DMS (JLB)

**REPORT AND
RECOMMENDATION RE:**

**(1) DENYING PETITION FOR
WRIT OF HABEAS CORPUS;**

**(2) DENYING REQUEST FOR
EVIDENTIARY HEARING; and**

**(3) ORDER DENYING
REQUEST TO APPOINT
COUNSEL**

I. INTRODUCTION

Petitioner Dennis Mickjale Potts, a state prisoner proceeding pro se and in forma pauperis with a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, challenges his conviction in San Diego County Superior Court Case No. SCD211145 for two counts of first degree special circumstances murder and one count of conspiracy to obstruct justice. (Pet. at 4-6, 10-62 ECF No. 1.)¹ The Court has reviewed the Petition, the Answer and Memorandum of Points and Authorities in Support of the

¹ Page numbers for docketed materials cited in this Report and Recommendation refer to those imprinted by the Court's electronic case filing system.

1 Answer, the Traverse, the lodgments, the record, and all the supporting documents
2 submitted by both parties. For the reasons discussed below, the Court **DENIES** the
3 request for appointment of counsel, and recommends the Petition and the request for
4 an evidentiary hearing be **DENIED**.

5 **II. FACTUAL BACKGROUND**

6 This Court gives deference to state court findings of fact and presumes them to
7 be correct; Petitioner may rebut the presumption of correctness, but only by clear and
8 convincing evidence. *See* 28 U.S.C. § 2254(e)(1) (West 2006); *see also Parle v.*
9 *Fraley*, 506 U.S. 20, 35-36 (1992) (findings of historical fact, including inferences
10 properly drawn from these facts, are entitled to statutory presumption of correctness).

11 The following facts are taken from the California Court of Appeal opinion:

12 Potts and murder victim Tori Vienneau dated for about two months
13 during their senior year in high school. After they broke up, Potts dated
14 Nicole Zolezzi who attended the same high school. His relationship with
15 Zolezzi continued after graduation. In 2005, Zolezzi moved into the Potts
family home where Potts also lived with his parents. Potts and Zolezzi
became engaged in 2006.

16 For about six months after their high school graduation, Potts and
17 Vienneau engaged in sexual intercourse about three or four times a month.
Beginning in 2003, the two saw each other less frequently.

18 Vienneau in 2004 moved in with her then-boyfriend Neil
19 Springstube. Springstube and Vienneau had a roommate named Daniel
20 Moen. In December 2004, Potts and Vienneau had sexual intercourse for
what Potts claims was the last time. In early 2005, Vienneau text
messedaged Potts she was pregnant. Later that year, Vienneau gave birth to
a son she named Dean.

21 In spring 2006, Springstube submitted a DNA sample to determine
22 paternity. The result of that test showed Springstube was not Dean's
father. Disappointed, Springstube left Vienneau and moved to Florida.

23 With Springstube gone, Moen testified he began to spend more time
24 with Vienneau and Dean. Moen often babysat Dean when Vienneau was
at work and he took care of Dean for about a week in spring 2006, when
25 Vienneau traveled to Florida in an unsuccessful attempt to reconcile with
Springstube. On her return from Florida, Moen and Vienneau gave notice
26 under the lease; Moen moved in with his mother while Vienneau moved
in with girlfriend Autumn Castellones (Autumn), Autumn's two young
27 children and Autumn's sister Tricia Castellones (Tricia).

28 Vienneau struggled financially as a single mother, particularly after
Springstube moved away. After learning that Springstube was not the

1 father, Vienneau asked Potts to take a paternity test. Although initially
2 unhappy about taking the test and believing it was not possible for Dean
3 to be his son, Potts agreed to take a mail-in paternity test. As it turns out,
4 Potts submitted two tests and both showed he was not Dean's father.

5 When Vienneau learned Potts was also not Dean's father, she
6 became upset. Vienneau believed that Potts had tampered with the test
7 samples and insisted Potts take another paternity test supervised by the
8 court. Potts was upset by Vienneau's request. Vienneau confided in her
9 friends Potts had not told his fiancé or parents about Dean and the
10 "paternity issue" involving Vienneau.

11 In the early evening of July 26, 2006, Vienneau and Dean were
12 murdered in Autumn's apartment where Vienneau and Dean were
13 temporarily living. Earlier that day, Vienneau spoke by phone to her good
14 friend Tara Cardoso. Cardoso testified she and Vienneau talked for about
15 45 minutes, beginning around 12:30 p.m.

16 Vienneau told Cardoso that she (Vienneau) and Potts were having
17 dinner together that night, Potts was going to pick up her and Dean from
18 the apartment and Vienneau had arranged a babysitter for Dean.
19 According to Cardoso, Vienneau intended to tell Potts at dinner that night
20 that she (Vienneau) was taking him to court for paternity testing. During
21 the call, Vienneau told Cardoso that Potts had no interest in being Dean's
22 father.

23 Autumn testified she and Vienneau had been friends since about
24 2001. Autumn met Vienneau at work, where they also met Moen.

25 Moen testified his relationship with Vienneau blossomed over the
26 years and they became best of friends. Their relationship was strictly
27 platonic until five days before Vienneau was murdered, when Moen
28 testified they had sexual intercourse for the first and only time. Because
Moen was helping Vienneau take care of Dean, including driving Dean
to daycare almost daily, and because he spent a significant amount of time
with Vienneau parenting Dean, Moen testified he began to develop strong
feelings for Vienneau and Dean.

29 Vienneau's mother, Dayna Herroz, testified that Moen, Vienneau
30 and Baby Dean visited often. Herroz knew Moen from when he was
31 roommates with Springstube and her daughter. Herroz described Moen
32 as Dean's "other caretaker" and personally observed Moen had strong
33 feelings for Vienneau and would do anything for Vienneau. Herroz
34 testified that shortly before Vienneau's murder, Vienneau said Moen was
35 in love with her.

36 Herroz also testified she had lunch with Vienneau on the day
37 Vienneau was murdered. During their lunch, Vienneau confirmed she and
38 Potts were having dinner together that evening.

39 The weekend before Vienneau was murdered, Herroz and her
40 husband met with Vienneau and insisted Vienneau pursue court-ordered
41 paternity testing because like Vienneau, Herroz believed Potts had
42 tampered with the mail-in tests showing Potts was not Dean's father.

1 Vienneau responded she chose to have Dean and if Potts's family found
2 out about the baby, according to Potts his life would be ruined.

3 Herroz believed there were only two possible fathers of Dean, as
4 Vienneau had told her mother she had sexual intercourse with only
5 Springstube and Potts at or near the time she became pregnant. Herroz
6 firmly believed the time had come for her daughter to stop worrying about
7 Potts and what his family knew or did not know about Dean, and believed
8 if Potts was in fact the father, as Herroz surmised, that information should
9 be made public. Vienneau told her mother she intended to tell Potts "in
10 no uncertain terms" during their dinner on July 26 that Vienneau "was
11 going to ask for a paternity test through the courts, because she believed
12 he falsified the previous one."

13 Herroz testified and phone records showed that at 5:27 p.m., shortly
14 before Vienneau's murder, Herroz and Vienneau spoke for about 12
15 minutes. During this phone conversation, Vienneau confirmed she was
16 having dinner that evening with Potts. Phone records also show Potts
17 called Vienneau at 5:39 p.m. on the night of the murders.

18 The babysitter, Cecily Bohrer, testified she worked with Herroz and
19 babysat for Vienneau about eight to 10 times before the murders.
20 Vienneau had called Bohrer a day or two before the murders and asked
21 Bohrer to babysit Dean on the night of July 26 because Vienneau and
22 Potts were having dinner together. As they had arranged, when Bohrer
23 got home from work on July 26 she called Vienneau (at 5:42 p.m.) and
24 told Vienneau she could drop off Dean. According to Bohrer, Vienneau
25 said she needed "to do a couple of little things" and then she and Potts
26 would bring Dean over to Bohrer's apartment.

27 On the evening of the murders, Moen was working his shift as
28 supervisor at Savon (which later became CVS) in Chula Vista. Moen's
shift typically was from 2:00 p.m. to 10:30 p.m. The store's video
surveillance — which detectives described as antiquated — was not
activated until 6:40 p.m. on the day of the murders, which store security
said was not uncommon.

On the evening of the murders, Moen testified while on his break
he briefly left work at around 5:20 p.m. to visit his mother in the hospital.
Moen already had visited his mother in the hospital earlier that day. As
Moen got into his car and began to drive, Moen decided he did not have
sufficient time to visit his mother. Moen testified he stopped his car,
parked in the store's parking lot and called Vienneau from inside his car.
Moen testified he and Vienneau spoke for only a few minutes about
"random things" before he went back to work.

Surveillance video from the store showed Moen inside the store
beginning at 6:43 p.m. (after the video was turned on), where Moen
remained until the store closed. Moen testified Autumn called him at
about 9:15 p.m. that night and (as it turns out, incorrectly) informed him
that Vienneau had killed Dean and then herself. After receiving the news
about Vienneau and Dean, Moen called his store manager who gave Moen
permission to close early. Moen called his brother, who met Moen

1 outside the apartment where Vienneau and Dean had been living and were
2 found dead.

3 John Young was a detective in the San Diego Police Department
4 homicide unit in July 2006. Young testified he interviewed Moen at the
5 crime scene on the night of the murders and described Moen as "very
6 distraught." During a later interview that night in the interview room at
7 the San Diego Police Department, Moen told Young he had begun work
8 at 2:00 p.m. the previous day. Young interviewed two other Savon
9 employees who had worked with Moen on the day of the murders and
10 corroborated Moen's story.

11 A few days later, Moen called Young and volunteered that on the
12 evening of the murders Moen had left the store at about 5:20 p.m. for
13 about 10 or 15 minutes. As a result of this new information, Detective
14 Young analyzed the surveillance video from the store and determined that
15 at 6:53 p.m., the same time Moen received a final text message from
16 Vienneau's phone, Moen was inside the store working.

17 Detective Young testified the distance between the Savon where
18 Moen worked and the apartment where Vienneau was living was about 10
19 miles each way and the drive took at least 35 minutes roundtrip. Because
20 Moen was working at 6:53 p.m. when he received the final text message
21 from Vienneau's phone and because Vienneau's phone was found next to
22 her body inside the apartment, Detective Young concluded Moen was not
23 the murderer.

24 As part of his investigation, Detective Young analyzed the phones
25 and/or the phone records of various individuals, including Moen and
26 Vienneau. At 5:50 p.m. on the evening of the murders, Moen texted
27 Vienneau that he was "sorry [he] was mean" to Vienneau and he should
28 have "been more supportive" of her. Moen testified his 5:50 p.m. text
message to Vienneau was in connection with a six-minute telephone
conversation between him and Vienneau that occurred earlier, while
Moen had sat in his car outside the store on his break. According to
Moen, during that telephone conversation he told Vienneau he did not
want Potts to have any contact with Dean.

29 Moen received a text back from Vienneau's phone saying, "It's
30 okay. I'm just teasing you." Two minutes later, Moen texted Vienneau,
31 "Okay. I'm sorry, though. I make up the past every day." At 5:54 p.m.,
32 Moen received a text from Vienneau's phone, "I know. You don't have
33 to." At 5:57 p.m., Moen texted Vienneau, "Yeah, I want to." At 6:03
34 p.m., Moen wrote Vienneau a long text stating in part, "I'm sorry for
35 hurting you and pushing you away. I really do love you and want to be
36 with you. Love you."

37 Moen testified the next series of texts he received from Vienneau's
38 phone were "fishy" and "out of the ordinary" from her previous text
39 messages. At 6:10 p.m., Moen received a text from Vienneau's phone
40 stating, "Dean is sleeping like a dead dog." At 6:27 p.m., Moen received
41 another text from Vienneau's phone stating, "I canceled on Dennis [Potts].
42 Come by when you get off." At 6:32 p.m., Moen replied, "I didn't know
43 he was coming over." At 6:39 p.m., Moen received a text in response,
44 "Yeah." At 6:48 p.m., Moen texted Vienneau, "Oh, why [did] you

1 cancel?" In reply Moen received a text from Vienneau's phone, "Didn't
 2 want to see him." At 6:50 p.m., Moen replied, "You'd rather see me."
 3 The response from Vienneau's phone was, "duh." Moen then texted
 4 Vienneau at 6:51 p.m., "Hee, hee. What time was he coming over?" At
 5 6:53 p.m., the last text sent from Vienneau's phone read, "There's some
 6 scary guy standing by my car looking into my place."

7 At 7:05 p.m., Moen texted Vienneau back, "Yikes. What time was
 8 he coming?" At 7:09 p.m., Moen again texted Vienneau, asking "Is the
 9 guy still there?" At 7:19 p.m., Moen texts Vienneau, "You there?" An
 10 hour later, Moen tried to call Vienneau from the Savon phone, but nobody
 11 answered. The next text Moen received was from Autumn, advising
 12 Moen about an emergency involving Vienneau.

13 Moen and Herroz both testified that Vienneau would never say
 14 Dean was sleeping "like a dead dog" and would never have referred to
 15 Autumn's apartment as "my place" (in connection with the stranger
 16 standing outside her car) because Vienneau appreciated it was Autumn's
 17 apartment, Autumn was letting Vienneau and Dean stay in the apartment
 18 temporarily and Autumn paid the rent. Moen also testified that in the six
 19 years he and Vienneau texted she had never used the word "duh" in a text
 20 message.

21 Michael Morgan, an expert in digital forensics, testified he
 22 recovered text messages sent by Potts to Vienneau that had been "deleted"
 23 (e.g., no longer in the active memory) from her phone. One such
 24 recovered message was sent on July 25, 2006, when Vienneau received
 25 a text message from Potts's phone reading, "Hmmm, I don't think you
 26 could. I'm jealous, hehehe. I totally want to be sitting with you in
 27 between my legs and me holding you so comfortable."

28 In addition, Richard Wissemann, a criminal investigator for the
 People, testified he reviewed the text message data from Vienneau's
 phone and found there were 26 messages — including the deleted
 messages — between Potts and Vienneau on the day of the murders. At
 4:32 p.m. that day, Vienneau texted Potts saying, "You still coming?" A
 minute later, Vienneau received a response (recovered by the digital
 forensic specialist) from Potts's phone stating, "Duh, I[']ll be there at
 5:15. You home alone?" In reply, Vienneau sent Potts a message, "Yeah.
 Just Dean and I. Is my surprise good?"

At 4:35 p.m., Vienneau received a response from Potts's phone that
 was also recovered by the forensics expert that read, "Yes. Hehehe. It
 will be in my car. But there's something I want to tell you that you'll like.
 Where's Autumn's sister?" Vienneau replied, "I'm not sure. She could be
 in her room. I don't know. What did you want to tell me?" At 4:41 p.m.,
 Vienneau texted Potts, "Oh, God, please tell me it's not a paternity test
 because I want to forg[e]t about it for one night." Vienneau received a
 response at 4:43 p.m. from Potts's phone (also recovered by experts) that
 said, "Baby, relax, it's not. Just smile and wait for me to come over and
 be extra nice to me. I'll call you when I'm almost there." Vienneau
 responded, "Okay."

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1 Investigator Wissemann testified phone records showed a phone
2 call was placed from Potts's phone to Vienneau's phone at 5:39 p.m. on
the evening of the murders.

3 Tricia testified she was living in an apartment with her sister
4 Autumn and her sister's two children at the time of the murders.
5 Vienneau and her son also were living temporarily in the apartment.
6 Vienneau slept on the couch in the living room and Dean typically slept
in his playpen in the hallway or in Autumn's room if Autumn was not at
home. Tricia estimated that Vienneau and her son had been living in the
apartment about a month before they were murdered.

7 On the day of the murders, Tricia testified she came home around
8 1:00 p.m. While she was making herself lunch, Vienneau and her son
9 returned to the apartment. Tricia ate in her bedroom and later, with her
10 door closed, fell asleep in her room while watching television. After
11 sleeping for a few hours, Tricia awoke on her own shortly before 7:00
p.m. From the minute she awoke, Tricia did not recall hearing any noise
from inside the apartment. She testified that even with her bedroom door
closed, she typically could hear conversations emanating from the living
room, the hallway and even from her sister's separate bedroom.

12 After a few minutes, Tricia went to the kitchen. On her way, Tricia
13 saw Vienneau sitting on the floor with her back against the couch.
14 Vienneau was partially covered by a blanket or towel. Tricia described
the apartment as appearing "normal." Tricia returned to her room, made
a few telephone calls and then left to get some gas in her car.

15 When Tricia returned to the apartment, she found Vienneau had not
16 moved. Tricia also noticed for the first time a "red spot" on the back
17 cushion of the new couch. Tricia called Vienneau's name a few times and
18 when Vienneau did not respond, Tricia walked over to Vienneau and
19 lifted the blanket/towel partially covering Vienneau. Tricia saw the cord
to her hair-straightening iron, which Tricia had left on the end table in the
living room, wrapped tightly around Vienneau's neck. Tricia next ran
down the hall to check on Dean. Tricia opened Autumn's door and found
Dean also dead. Tricia ran out of the apartment and called 9-1-1. She
then called Autumn.

20 Police responded to Tricia's call at about 8:54 p.m. Tricia met the
21 police at the front gate, which was closed. According to police, Tricia
22 was hysterical as she described the scene inside the apartment. Police
23 were forced to park their vehicles outside the apartment complex because
Tricia did not have a device that opened the secured, sensor-activated
gate. Tricia directed police to the third floor apartment.

24 San Diego Police Officer Victor Rodriguez testified he opened the
25 front door to the apartment and found no evidence of a forced entry or
26 tampering. The front door to the apartment also had a working
"peephole." Officer Rodriguez walked over to Vienneau and observed a
27 cord wrapped about four times around her neck. Officer Rodriguez
28 noticed Vienneau was not breathing and saw the cord was wrapped so
tightly it was actually embedded into Vienneau's neck. At that point,
Officer Rodriguez believed Vienneau had been murdered.

1 Officer Rodriguez drew his revolver and went room-to-room
2 looking for suspects and other victims. When he opened the door to what
3 turned out to be Autumn's darkened room, Officer Rodriguez found an
"infant," later identified as Dean, dead inside the playpen. Dean had a
telephone cord also wrapped about four times around his neck.

4 San Diego Police Detective John Tefft investigated the crime scene.
5 He testified that because the apartment was on the third floor, there was
6 no way anybody could climb through a window to gain access to the
7 apartment, since it was a "sheer drop" down to the ground. Detective
8 Tefft found a diaper bag filled with diapers and similar objects next to
Vienneau's body. About a foot away from Vienneau was her cell phone,
among other items. He noted there were no signs of a struggle, as the
living room was not in disarray and the only furniture overturned in that
room was a small child's stool.

9 Detective Tefft found one of Vienneau's legs was unclothed, while
10 the other leg was partially clothed by her jeans. Vienneau's underwear
11 was down to her knees. Vienneau's blouse was torn, but she was still
wearing her bra.

12 Detectives later determined the crime scene had been staged by
13 Vienneau's attacker to make it appear that Vienneau had been the victim
14 of a sexual assault. Detectives came to this conclusion because their
investigation showed no physical evidence to support a sexual assault,
such as semen or ejaculate on Vienneau's jeans or underwear, or the floor
in the living room.

15 Detective Tefft found there was blood on Vienneau's head, but
16 none on her hands or feet. Detective Tefft testified this finding was
17 significant because most people when they are injured will instinctively
18 use their hands to touch the injury, resulting in a transfer of blood.
Detective Tefft also found no evidence of any "defensive wounds" on
Vienneau's hands or forearms, or evidence she was involved in fighting
with her attacker (e.g., broken nails).

19 As for Dean, Detective Tefft said the child had been strangled with
20 a phone charging cord that was wrapped around the baby's neck and tied
to the rail of the playpen.

21 Chief Medical Examiner Glenn Wagner testified Vienneau
22 sustained a deep laceration to the back of her scalp that caused profuse
23 bleeding. In addition, during the autopsy Wagner discovered a blunt force
24 injury near Vienneau's left ear. Wagner found bleeding on Vienneau's
25 brain from both areas of impact. Wagner surmised the laceration was
caused by an instrument of some sort, while the contusion near
Vienneau's ear likely was caused by a body part striking the head, such
as a fist, a hand or a knee. Wagner also found blunt force trauma to the
front of Vienneau's head.

26 As a result of the presence of petechia or small, pinpoint
27 hemorrhages on her face, Wagner surmised Vienneau was alive when the
28 ligature was wrapped around her neck. Wagner found no evidence
Vienneau fought back or was conscious when she started to bleed, and

1 opined the blunt force injuries rendered her unconscious and she either
2 fell or was placed against the couch, where she was strangled.

3 Wagner testified that from the condition of Vienneau's clothing it
4 initially appeared she had been the victim of an attempted sexual assault.
5 However, his physical examination showed no evidence to support such
6 an attack. Wagner noted there was no evidence of any sexual assault
involving the mouth, the rectum or the vagina either on gross or
microscopic examination. FN3 He also noted the location of Vienneau's
body on the floor and against the couch was not consistent with a sexual
assault.

7 FN3. Forensic investigators found low levels of spermatozoa
8 matching Moen's DNA profile in Vienneau's vagina.
9 However, the low sperm count in Vienneau's vagina was
consistent with the semen having been deposited a few days
before the murders.

10 As to Dean, the cord around his neck was tied with a "granny" or
11 "overhand" knot as opposed to a square knot that was used to tie the
12 electrical cord around his mother's neck. Based on the medical evidence,
Wagner opined the electrical cord was applied to Dean while he was
standing up in the playpen. Over time, as Dean became fatigued and sat
down, he hanged from the cord.

13 At about 2:45 a.m. on July 27, 2006, San Diego Police homicide
14 detective Joseph Cristinziani, two other detectives and a police sergeant
15 went to the Potts family's home to interview Potts. Before they contacted
Potts, the detectives informally agreed not to mention to Potts that Dean
also had been murdered.

16 During the interview, Potts told detectives he and Vienneau were
17 long-time friends and were physically intimate at one point but not for
18 about a year or two. Potts told police he last saw Vienneau on July 20,
19 when they discussed getting together after Potts returned from a trip to
Las Vegas. Potts said he and Vienneau exchanged several text messages
the day before, but Potts erased those messages because he did not want
his fiancé to view them.

20 Potts told the detectives he left his house at about 5:00 p.m. the
21 evening before to visit his friend Maxwell Corn (Max). Potts went to
22 Max's house to review surveillance video taken from security cameras at
the Potts home to catch the person stealing the family's newspaper.
23 According to Potts, Max had computer software that would allow them to
review the surveillance video taken by the Pottses' security cameras.
24 Potts told detectives he stayed at Max's house until about 8:00 p.m., then
left and went straight home where he remained the rest of the evening.

25 Potts told detectives he and Vienneau did not have dinner plans the
26 evening before. Potts explained he and Vienneau did have a "casual
27 conversation" where they discussed "just going to simply hang out"
together, but their plans were "not set in stone." When detectives
28 followed up and asked Potts whether he and Vienneau had made dinner
plans the night before, Potts adamantly denied making any such plans
with Vienneau. Potts also told detectives it was Vienneau who had

1 decided the evening before she did not want to get together with Potts.
2 According to Potts, Vienneau instead decided to take Dean to the
3 babysitter and to text Moen at work about hanging out together later that
4 night.

5 In response to questions about paternity testing, Potts admitted to
6 detectives he had taken a paternity test that showed he was not Dean's
7 father. Detective Cristinziani testified that during the entire 20-minute
8 interview, Potts never once asked about the welfare of Dean.

9 Detective Cristinziani next interviewed Potts at the police station
10 on July 28, 2006, and took a DNA sample from Potts. FN4 During this
11 interview, Potts maintained Vienneau had cancelled their tentative plans
12 the evening she was murdered and denied he was angered by her request
13 he take another paternity test, stating he would be "really, sincerely
14 surprised" if he was the father of Dean.

15 FN4. That interview was recorded on video and was played
16 at trial for the jury. The video was made a part of the record
17 pursuant to the People's unopposed request to augment.

18 On the morning of September 13, 2006, Detective Tefft executed
19 a search warrant at the Potts family home seeking items related to
20 paternity, Potts's relationship with Vienneau and Potts's computer and
21 digital camera, among other items. Potts denied having the paternity
22 paperwork at the house and told detectives he had erased from his
23 computer any information sought in the warrant. Detectives nonetheless
24 seized a standard desktop computer from Potts's bedroom and a laptop
25 computer from the family's living room.

26 During execution of the search warrant, Detective Cristinziani
27 asked Potts directly if Potts had tampered with the previous paternity test
28 that showed Potts was not the father of Dean. Potts denied any tampering
and said he sent in his own DNA for testing. In response, Detective
Cristinziani told Potts that police had conducted their own paternity test
and it showed that Potts was in fact Dean's father. Potts appeared
shocked by the news and denied he was the father. Potts also denied
loaning his cell phone to anyone on the day of the murders and confirmed
he was at Max's house that evening between 5:00 and 8:00 p.m.

29 Detective Cristinziani told Potts police had obtained Potts's cell
30 phone records and cell tower information from July 26, 2006, and
31 determined Potts was "pinging" from cell towers that were inconsistent
32 with Potts's statement he never left Max's house between 5:00 and 8:00
33 p.m. Potts responded the information provided by the phone company
34 must have been wrong. Potts also again denied having any dinner plans
35 that night with Vienneau, suggested Vienneau was a "flake" and said that
36 is why they had not seen each other on the night of the murders.

37 Next, despite his earlier statement to police, Potts said he had
38 received only one text message from Vienneau on the day of the murders
and that he had not texted her back. Detective Cristinziani told Potts that
the phone records showed just the opposite, that there had been phone
calls and myriad text messages between Potts and Vienneau on July 26,
2006.

1 As part of his investigation, Detective Cristinziani obtained from
2 the company the swabs and documents Potts submitted for the mail-in
3 paternity testing. Detective Cristinziani testified Potts actually submitted
4 two applications for paternity testing, with each test costing \$245. Phone
5 records showed Potts called the testing company for results on July 17 and
6 again on July 19, 2006. Cell phone records also showed that Potts called
7 the company four times before he was interviewed by detectives on July
8 28, 2006, just two days after the murders.

9 Detectives interviewed Max Corn in late September 2006. Max
10 adamantly denied submitting his DNA in place of Potts's in connection
11 with the paternity testing of Baby Dean. Max also remained steadfast that
12 he and Potts were together at Max's residence between 5:00 and 8:00 p.m.
13 on the evening of the murders. Detectives collected a DNA sample from
14 Max and later determined the DNA submitted by Potts for the paternity
15 testing in fact matched Max's DNA. FN5

16 FN5. Max was subsequently convicted for conspiracy to
17 obstruct justice. His conviction is not the subject of this
18 appeal.

19 A computer forensic expert examined the hard drive of the
20 computer taken from Potts's bedroom during execution of the search
21 warrant. The expert, Robert Petracheck, found the following Internet
22 searches deleted from the hard drive of Potts's computer: (1) "committing
23 murder" (June 24, 2006); (2) "where are court-ordered paternity test
24 conducted" (same); (3) "court-ordered paternity test procedure" (June 26,
25 2006); (4) "how to cheat a swab paternity test" (same); (5) "best way to
26 kill someone" (June 28, 2006); (6) "getting away with murder" (June 30,
27 2006); (7) "getting out of child support" (July 7, 2006); (8) "performing
28 choke hold" (July 19, 2006); (9) "how to kill someone" (same); (10) "how
did you get away with murder" (same); (11) "knocking someone
unconscious" (July 25, 2006); and (12) "knocking someone in the head"
(same).

Petracheck also testified that on August 8, 2006, 20 pages of phone
records from Potts's cell phone were downloaded onto Potts's computer
from the cell phone company's website. A day later, two entries on page
17 of the downloaded document had been opened and altered.
Specifically, the call log was changed to show that calls at 5:39 p.m. and
6:44 p.m. on the evening Vienneau was murdered were made from Chula
Vista rather than from Bonita. The altered version of that document was
saved on and printed multiple times from Potts's computer and, according
to Petracheck, when printed looked identical to the original log.

Petracheck also testified that from the printer cue (e.g., the
mechanism by which the computer manages print jobs), he determined
that two print jobs printed in sequence before the altered phone records
were the paternity testing results.

Finally, Petracheck testified that Potts's computer was equipped
with two video processing applications, one of which he described as
"professional grade" software that was used in the movie industry for
editing of motion pictures. Petracheck noted as part of his investigation
he also had reviewed a computer retrieved by police from Max's residence

1 and found a computer program known as “Pinnacle” had been installed on
 2 that computer beginning shortly after 5:00 p.m. on the evening of the
 3 murders. Petracheck testified the program installation was completed at
 about 7:10 p.m. later that evening, but the software program was never
 used.

4 Investigators determined from Potts’s cell phone records that
 5 between about 5:00 pm. and 8:00 p.m. on the day of the murders all calls
 6 made or received by Potts on his cell phone were routed through cell
 tower number 814, with the exception of one call at 6:44 p.m. that was
 7 routed through cell tower number 425. Dennis McColl, a senior engineer,
 testified that cell tower 425 was located about .6 miles from the apartment
 8 where Vienneau was murdered. McColl further testified that if Potts had
 been at Max’s residence at 6:44 p.m. when Potts received that call (from
 9 his mother), it would have been routed through cell tower 814 or possibly
 through cell tower 357, but that it would have been “next to impossible”
 10 for a cell phone user to receive a call at Max’s residence that had been
 routed through cell phone tower 425.

11 (Lodgment No. 6 at 2-21.)

12 **III. PROCEDURAL BACKGROUND**

13 On January 16, 2008, the San Diego County District Attorney’s Office filed an
 14 Information charging Dennis Mickjale Potts with two counts of murder, a violation of
 15 California Penal Code (Penal Code) § 187(a) and one count of conspiracy to obstruct
 16 justice, a violation of Penal Code § 182(a)(5). (Lodgment No. 1 at 0093-95.)² The
 17 Information also charged a special circumstance allegation that Potts committed
 18 multiple murders. (*Id.*)

19 Following a jury trial, a jury found Potts guilty of all counts and found the
 20 special circumstance to be true. (Lodgment No. 1 at 0249-51.) Potts was sentenced to
 21 life without the possibility of parole on counts one and two, to be served consecutively,
 22 and three years in prison on the obstruction of justice count, also to be served
 23 consecutively. (*Id.* at 0254.)

24 Potts filed a direct appeal and concomitant petition for writ of habeas corpus of
 25 his conviction to the California Court of Appeal, Fourth Appellate District, Division

26 ///

27 _____
 28 ² Max Corn was Potts’ codefendant on the obstruction of justice count at the time. (*See*
 Lodgment No. 1 at 0093.)

1 One. (Lodgment Nos. 3-5.) The state appellate court affirmed the convictions in an
 2 unpublished written opinion which addressed both the direct appeal and the habeas
 3 corpus petition. (Lodgment No. 6.)

4 Potts then filed a Petition for Review in the California Supreme Court, which
 5 denied the petition without citation of authority. (Lodgment Nos. 7-8.) Potts filed a
 6 second habeas corpus petition in the California Supreme Court, which also denied the
 7 petition without citation of authority. (Lodgment Nos. 9-10.)

8 Potts filed a Petition for Writ of Habeas corpus pursuant to 28 U.S.C. § 2254 in
 9 this Court on March 11, 2013 [ECF No. 1].³ Respondent filed an Answer and
 10 Memorandum in Support of the Answer on August 16, 2013 [ECF No. 16]. Potts filed
 11 a Traverse on November 12, 2013 [ECF No. 21].

12 **IV. DISCUSSION**

13 Potts raises four claims in his Petition. First, he claims the state trial court
 14 abused its discretion and violated his federal due process rights to a fair trial by
 15 denying a motion for a mistrial. Second, he contends trial counsel was ineffective.
 16 Third, Potts argues his appellate counsel was ineffective. Fourth, he claims the
 17 prosecutor committed misconduct during closing argument. (Pet. at 4-6, 14-61, ECF
 18 No. 1.) Respondent argues the state court's resolution of the claims was neither
 19 contrary to, nor an unreasonable application of, clearly established Supreme Court law.
 20 (Mem. of P. & A. Supp. Answer at 8-19, ECF No. 16.)

21 *A. Standard of Review*

22 This Petition is governed by the provisions of the Antiterrorism and Effective
 23 Death Penalty Act of 1996 ("AEDPA"). *See Lindh v. Murphy*, 521 U.S. 320 (1997).
 24 Under AEDPA, a habeas petition will not be granted with respect to any claim
 25 adjudicated on the merits by the state court unless that adjudication: (1) resulted in a
 26 decision that was contrary to, or involved an unreasonable application of clearly

27 ³ Potts initially filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241,
 28 which the Court construed as a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.
 (See ECF No. 4.)

1 established federal law; or (2) resulted in a decision that was based on an unreasonable
2 determination of the facts in light of the evidence presented at the state court
3 proceeding. 28 U.S.C. § 2254(d); *Early v. Packer*, 537 U.S. 3, 8 (2002). In deciding
4 a state prisoner’s habeas petition, a federal court is not called upon to decide whether
5 it agrees with the state court’s determination; rather, the court applies an extraordinarily
6 deferential review, inquiring only whether the state court’s decision was objectively
7 unreasonable. *See Yarborough v. Gentry*, 540 U.S. 1, 4 (2003); *Medina v. Hornung*,
8 386 F.3d 872, 877 (9th Cir. 2004).

9 A federal habeas court may grant relief under the “contrary to” clause if the state
10 court applied a rule different from the governing law set forth in Supreme Court cases,
11 or if it decided a case differently than the Supreme Court on a set of materially
12 indistinguishable facts. *See Bell v. Cone*, 535 U.S. 685, 694 (2002). The court may
13 grant relief under the “unreasonable application” clause if the state court correctly
14 identified the governing legal principle from Supreme Court decisions but
15 unreasonably applied those decisions to the facts of a particular case. *Id.* Additionally,
16 the “unreasonable application” clause requires that the state court decision be more
17 than incorrect or erroneous; to warrant habeas relief, the state court’s application of
18 clearly established federal law must be “objectively unreasonable.” *See Lockyer v.*
19 *Andrade*, 538 U.S. 63, 75 (2003).

20 Where there is no reasoned decision from the state’s highest court, the Court
21 “looks through” to the underlying appellate court decision and presumes it provides the
22 basis for the higher court’s denial of a claim or claims. *See Ylst v. Nunnemaker*, 501
23 U.S. 797, 805-06 (1991). If the dispositive state court order does not “furnish a basis
24 for its reasoning,” federal habeas courts must conduct an independent review of the
25 record to determine whether the state court’s decision is contrary to, or an unreasonable
26 application of, clearly established Supreme Court law. *See Delgado v. Lewis*, 223 F.3d
27 976, 982 (9th Cir. 2000) (overruled on other grounds by *Andrade*, 538 U.S. at 75-76);
28 *accord Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003). However, a state court

1 need not cite Supreme Court precedent when resolving a habeas corpus claim. *See*
 2 *Early*, 537 U.S. at 8. “[S]o long as neither the reasoning nor the result of the state-court
 3 decision contradicts [Supreme Court precedent,]” *id.*, the state court decision will not
 4 be “contrary to” clearly established federal law. *Id.* Clearly established federal law,
 5 for purposes of § 2254(d), means “the governing principle or principles set forth by the
 6 Supreme Court at the time the state court renders its decision.” *Andrade*, 538 U.S. at
 7 72.

8 *B. Denial of the Motion for Mistrial/Due Process (claim one)*

9 In claim one, Potts contends the trial court improperly denied his motion for a
 10 mistrial and that the denial violated his federal due process rights to a fair trial. (Pet.
 11 at 4, 14-28, ECF No. 1; Traverse at 8-11, ECF No. 21.) Potts’ attorney made the
 12 motion for a mistrial when it was discovered mid-trial that, contrary to both the
 13 prosecutor’s and defense attorney’s belief, it was possible to determine when text
 14 messages were sent from Vienneau’s phone not just when those messages were read
 15 by Moen. (Lodgment No. 2, vol. 7 at 1153-55; vol. 8 at 1361.) Up until that point,
 16 counsel had built his defense on the argument that Moen could have killed Vienneau
 17 and Dean, sent the messages from Vienneau’s phone to himself, then read the texts
 18 while he was visible on the surveillance camera at work. (Lodgment No. 2, vol. 7 at
 19 1156-58.) When it was revealed that Vienneau’s phone could conclusively show the
 20 texts were sent while Moen was on the surveillance video, counsel moved for a mistrial
 21 because, according to counsel, the new information eviscerated his defense because it
 22 showed Moen was “factually innocent.” (Lodgment No. 2, vol. 8 at 1361-62, 1371-74.)
 23 In the alternative, counsel asked the trial judge to exclude the newly acquired
 24 information about Vienneau’s phone because it would deprive Potts of a fair trial.⁴ (*Id.*
 25 at 1371-74.) The trial judge denied the motion. (*Id.* at 1375.)

26
 27 ⁴ Petitioner here concedes, as he did in his Petition for Review to the California Supreme Court
 28 on direct review, that the text time-stamp evidence was properly admitted at trial and Respondent
 committed no discovery violations with respect to the evidence. (Pet. at 23, ECF No. 1; Lodgment
 No. 7 at 13, 16.)

Potts contends the denial of the mistrial motion violated his right to a fair trial because the newly discovered evidence “completely gutted the defense case that had been built, [starting] during jury selection, and continuing through opening statements and then throughout the prosecution’s case.” (Pet. at 20, ECF No. 1.) Respondent counters that the state court’s resolution of this claim was neither contrary to, nor an unreasonable application of, clearly established Supreme Court law. (Mem. of P. & A. Supp. Answer at 8-11, ECF No. 16.)

Potts raised this claim in the Petition for Review he filed in the California Supreme Court on direct review. (Lodgment No. 7.) That court denied the petition without citation of authority. (Lodgment No. 8.) Accordingly, this Court must “look through” to the state appellate court’s opinion denying the claim as the basis for its analysis. *Ylst*, 501 U.S. at 805-06. That court wrote:

As Potts notes in his brief, the trial court *properly* admitted the “timing evidence” taken from Vienneau’s cell phone discovered mid-trial by the People showing the actual times the final text messages were sent from her phone and received by Moen on the night of the murders. In addition, as Potts also notes the prosecution did *not* violate the discovery disclosure rules in connection with the discovery of such evidence.

The evidence was properly uncovered during trial that *may* have undermined Potts’s third party culpability defense involving Moen does not mean Potts was prejudiced in a constitutional sense or otherwise received an unfair trial. There being no error, we conclude the trial court properly exercised its discretion in denying Potts’s mistrial motion.

As a threshold matter, we note that even before the “timing evidence” from Vienneau’s cell phone was discovered, Potts’s third party defense theory involving Moen was tenuous. The evidence from the video surveillance equipment place Moen at work at 6:43 p.m., at or near the critical time police estimated Vienneau and Baby Dean were murdered. Phone records show text messages were exchanged between Moen and Vienneau’s phone both before and after 6:43 p.m.

The appellate court record also shows the apartment where Vienneau was living was about 10 miles from Moen’s work, the drive from Moen’s work to the apartment and back took at least 35 minutes and that Moen received a final text message from Vienneau’s phone at 6:53 p.m. regarding the “scary guy” standing by her car looking into “my place.”

We further note that when the defense proffered its theory that Moen murdered Vienneau and Dean and sent himself text messages from Vienneau’s phone to cover up that crime, the defense unequivocally stated

1 it would *not* be relying on expert testimony to support this theory, which
 2 was *crucial* to its third party culpability defense involving Moen. Thus,
 3 the defense never sought to offer any evidence to show how Moen
 4 allegedly was able to alter the times of the text messages he allegedly sent
 5 himself from Vienneau's phone, after he allegedly killed Vienneau and
 6 Dean, so they were recorded as being received by Moen after he returned
 7 to work, turned on the video surveillance equipment in the store and
 8 purposely looked into the camera with his phone in hand to verify for
 9 anyone who subsequently viewed the video he was in fact inside the store
 10 at 6:43 p.m. that night.

11 In any event, the record shows the defense was *not* precluded from
 12 presenting its third party culpability defense and arguing at closing this
 13 defense created reasonable doubt to acquit Potts of the murders. The
 14 record shows the defense focused suspicion on Moen, claiming Moen
 15 finally "snapp[ed]" when he and Vienneau had sexual intercourse a few
 16 days before the murders only to be rejected by Vienneau afterwards
 17 because of his weight.

18 What's more, the defense argued that two days before she was
 19 murdered Vienneau told Moen she was hanging out with an old boyfriend,
 20 which the defense claimed enraged Moen even though Moen testified "he
 21 wasn't bothered by it." The defense also noted the physical evidence
 22 linked Moen, and not Potts, to the murders.

23 Specific to the issue at hand, the defense also argued during closing
 24 that the timing of the text messages sent from Vienneau's phone to Moen
 25 did not establish Moen's factual innocence to the murders:

26 "One of the most important things to remember is that there's no
 27 way to validly compare the timing of the text[s] for a couple of different
 28 reasons. No. 1, Mr. Moen's phone was never taken for forensic analysis.
 29 For whatever reason, Detective Young, even though he looked at the
 30 phone on the night of the 26th, he gave it back [to Moen] about . . . eight
 31 hours later. It was never examined by the Department of Homeland
 32 [S]ecurity That would be a way to forensically tell the exact timing
 33 of things . . . [but] that phone was never taken in for analysis.

34 "Is it possible that someone helped Moen by doing these so-called
 35 fake texts from [Vienneau's] phone between 6:27 and 6:53 p.m.? . . . All
 36 of you who have texted for a least a couple of months know that
 37 sometimes you'll be texting back and forth with a friend and you won't
 38 hear from that friend for a while. Two or three hours may go by and then
 39 you'll get four or five texts in a row. I'm sure all of you have dealt with
 40 that at some time or another. And sometimes a week will go by and you'll
 41 get ten or twelve texts at a time You cannot claim that Danny Moen
 42 is factually innocent based on these text records alone. It's just not true."

43 Thus, the record shows that the defense presented the jury with its
 44 third party defense theory involving Moen and aggressively argued during
 45 closing that Moen was not factually innocent. As the fact finder, the jury
 46 was entitled to reject that defense, as turned out to be the case here. (See
 47 *People v. Smith* (2005) 37 Cal.4th 733, 739 [a court of review is bound to
 48 accept the factual and credibility determinations of the trier of fact].)

1 We thus conclude the trial court properly exercised its discretion in
2 denying Potts's mistrial motion because the admission of the "timing
3 evidence" from Vienneau's phone in no way damaged, much less
 irreparably damage[d]" Potts's chances of receiving a fair trial. (See
 People v. Silva (2001) 25 Cal.4th 345, 372-373.)

4 (Lodgment No. 6 at 31-34.)

5 Potts does not contend that the evidence was admitted in violation of state law
6 (Pet. at 23, ECF 1), but even if he did, he would not be entitled to relief. State
7 evidentiary rulings are not generally subject to federal habeas review. *Estelle*, 502 U.S.
8 at 70. *Id.* Further, to the extent Potts argues the trial court improperly denied his
9 mistrial motion based on state law grounds, he is not entitled to relief. *Estelle v.*
10 *McGuire*, 502 U.S. 62, 67-68 (1991) (holding that federal habeas relief is not available
11 for alleged violations of state law); *see also* 28 U.S.C. § 2254(a). The improper denial
12 of a mistrial motion can rise to the level of a federal due process violation, however,
13 if a petitioner can show the admission or denial rendered the trial "fundamentally
14 unfair." *Id.*; *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 897 (9th Cir. 1996).

15 Potts's contention is that, once the time-stamp evidence was discovered, its
16 admission (though proper) gutted his defense and rendered his trial fundamentally
17 unfair. (*Id.* at 14-28.) Simply because evidence favorable to the prosecution was
18 discovered late in the trial does not render its admission "fundamentally unfair,"
19 however. And, as the state court noted, Potts' defense was built on shaky ground even
20 before the text message timing evidence was discovered. Potts had both the motive —
21 a desire to prevent his relationship with Vienneau and his paternity of Dean to come
22 to light — and the opportunity — recovered text messages, independent witnesses, and
23 cell tower evidence established Potts was planning to meet Vienneau at the time of the
24 murders and his cell phone "pinged" off a tower only .6 miles from Vienneau's
25 apartment at the time the murders were believed to have been committed — to commit
26 the murders. (See Lodgment No. 2, vol. 3 at 309-12, 331; vol. 7 at 1216-19, 1230-32;
27 vol. 9 at 1695-97.) In contrast, by all accounts, Moen was in love with Vienneau and
28 loved Dean as well. (Lodgment No. 2, vol. 3 at 409-12; vol. 9 at 1693.) The theory

1 that Moen killed Vienneau because he was angry with her rejection of him did not
2 account for the murder of Dean. Moreover, the explanation for Moen's appearance on
3 the video surveillance tape at Savon shortly after the murders were believed to have
4 been committed — that he murdered Vienneau and Dean, sent himself text messages
5 from Vienneau's phone, then viewed them while he was on the surveillance tape —
6 was a very difficult theory to sell to the jury, even without the newly discovered
7 evidence. This was particularly true given the distance between Moen's work and
8 Vienneau's apartment and co-worker's testimony that Moen was not gone more than
9 15 minutes during his shift. The distance to and from Vienneau's apartment is a
10 minimum of 35 minutes. (Lodgment No. 2, vol. 5 at 749.)

11 The discovery of the text message timing information was undoubtedly
12 damaging to Potts' defense, but did not render his trial "fundamentally unfair." Trial
13 strategies, by their nature, are subject to mid-stream adjustments depending on how
14 evidence comes across to a jury, how witnesses testify or are impeached, or the
15 discovery of new information along the way. That is the nature of the adversary
16 process. The evidence was relevant and admissible, as Potts himself admits.

17 For the foregoing reasons, the Court concludes the state court's denial of the
18 claim was neither contrary to, nor an unreasonable application of, clearly established
19 Supreme Court law, and did not involve an unreasonable determination of the facts in
20 light of the evidence presented. *Williams*, 529 U.S. at 412-13. Potts is not entitled to
21 relief as to this claim.

22 *C. Prosecutorial Misconduct (claim four)*⁵

23 In claim four, Potts argues the prosecutor "impermissively vouched for the
24 credibility and degree of skill that its own expert witness possessed, during his Closing
25 Arguments to the jury[.] Petitioner was thereby denie[d] his rights to a fair trial and
26 due process of law." (Pet. at 56, ECF No. 1.) Specifically, Potts alleges the prosecutor

27 ⁵ The Court will address the prosecutorial misconduct (claim four) out of order and
28 before Potts' ineffective assistance of trial counsel claim (claim two) because Potts contends
trial counsel was ineffective for failing to object to the prosecutor's misconduct.

1 vouched for the credibility and skill of the cell tower expert, Dennis McColl, by stating
2 that “[w]hen you have an opportunity to examine and look at the qualifications and
3 whose experience and expertise to rely on, Mr. McColl’s expertise in this area is
4 probably unparalleled as it relates to this cell tower stuff.” (Pet. at 56, ECF No. 1;
5 Lodgment No. 2, vol. 9 at 2156.) Respondent contends the state court’s rejection of this
6 claim was neither contrary to, nor an unreasonable application of, clearly established
7 Supreme Court law. (Mem. of P. & A. Supp. Answer at 17-19, ECF No. 16.)

8 Potts raised this claim only in the second habeas corpus petition he filed in the
9 California Supreme Court following the denial of his direct appeal. (Lodgment No. 9
10 at 5, 30-34.) The California Supreme Court denied the petition without citation of
11 authority. (Lodgment No. 10.) Accordingly, this Court must conduct an independent
12 review of the record to determine whether that denial was contrary to, or an
13 unreasonable application of, clearly established Supreme Court law. *Himes*, 336 F.3d
14 at 853.

15 “As a general rule, a prosecutor may not express his opinion of the defendant’s
16 guilt or his belief in the credibility of government witnesses.” *United States v. Molina*,
17 934 F.3d 1440, 1444 (9th Cir. 1991) (citing *United States v. McKoy*, 771 F.2d 1207,
18 1210-11 (9th Cir. 1985)). A prosecutor commits misconduct (“vouching”) when he or
19 she “plac[es] the prestige of the government behind the witnesses through personal
20 assurances of their veracity or [by] suggesting that information not presented to the jury
21 supports the witnesses’ testimony” *Id.* at 1445 (citing *United States v. Wallace*,
22 848 F.2d 1464, 1473 (9th Cir. 1988)). However, “the touchstone of due process
23 analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the
24 culpability of the prosecutor.” *Smith v. Phillips*, 455 U.S. 209, 219 (1982). “It is not
25 enough that the prosecutor’s remarks [or actions] were undesirable or even universally
26 condemned.” *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Rather, a prosecutor
27 commits misconduct when his or her actions “so infect . . . the trial with unfairness as
28 to make the resulting conviction a denial of due process.” *Id.* (quoting *Donnelly v.*

1 *DeChristoforo*, 416 U.S. 637 (1974).) “Moreover, the appropriate standard of review
 2 for such a claim on writ of habeas corpus is ‘the narrow one of due process, and not the
 3 broad exercise of supervisory power.’” *Id.* (quoting *Donnelly*, 416 U.S. at 642).

4 The prosecutor in Potts’ case did not vouch for McColl. He did not “place the
 5 prestige of the government through personal assurances of [his] veracity,” but only
 6 argued to the jury that when they compared Snavelly and McColl’s expertise and
 7 experience, they would find McColl was a more reliable witness than Snavelly. The
 8 prosecutor’s statements, in context, are as follows:

9 [THE PROSECUTOR]: Now, Mr. Snavelly, the defense expert. We
 10 had a conference call with Mr. Snavelly in July of this year, 2009, where
 11 Mr. McColl sat down in a conference setting with myself, Mr. Armstrong,
 12 and Snavelly was on the phone. And Mr. Snavelly was allowed to ask any
 questions that he felt was appropriate, to make any suggestions he felt was
 appropriate, to volunteer any criticisms if he felt that was appropriate.

13 His response was that the efforts Mr. McColl had gone to was
 14 exhaustive, had no suggestions for any additional experiments to conduct,
 no criticisms of the work done. The work that Mr. McColl did in this
 matter was exemplary, and you should consider that.

15 Mr. Snavelly didn’t conduct a single experiment, didn’t have a
 16 single suggestion for an experiment to conduct. Just came in here and
 said, “It’s unlikely. It’s possible. It’s unlikely.” I think it was his
 conclusion in this area.

17 *When you have the opportunity to examine and look at the*
 18 *qualifications and whose experience and expertise to rely on, Mr.*
 19 *McColl’s expertise in this area is probably unparalleled as it relates to*
this cell tower stuff.

20 (Lodgment No. 2, vol. 9 at 2155-56) (emphasis added.)

21 “[I]n fashioning closing arguments, prosecutors are allowed reasonably wide
 22 latitude and are free to argue reasonable inferences from the evidence.” *United States*
 23 *v. Enriquez-Estrada*, 999 F.2d 1355, 1361 (9th Cir. 1993). Here, the prosecutor simply
 24 urged the jury to weigh the testimony of the competing cell tower experts by comparing
 25 their qualifications, a common and appropriate component of argument.

26 Potts contends the statement was improper because “the jury [was] never
 27 provided any reviewable evidence displaying either cell tower expert witness’
 28 ‘qualifications,’ ‘experience,’ and/or ‘expertise,’ beyond what they do for a living, and

1 how long they have been employed.” (Pet. at 59, ECF No. 1.) The record belies that
2 claim. McColl testified he was a radio frequency engineer employed by Verizon since
3 1994. (Lodgment No. 2, vol. 5 at 1197.) His official title was “senior performance
4 engineer.” (*Id.*) He earned a Bachelor of Science degree from San Diego State
5 University in electrical engineering. (*Id.*) His expertise came from his years of work
6 in the area of radio frequency engineering. (*Id.*) He was responsible for “maintaining
7 performance in a group of cells in San Diego, including downtown, interstate 8 down
8 to the border, over to about La Mesa . . . ,” and as a result he had an “in-depth
9 understanding of how cell phones . . . [and] cell towers work on the Verizon network.”
10 (*Id.* at 1198.)

11 Defense witness Snavelly testified he was an electrical engineer who live in Fort
12 Lauderdale, Florida and Alabama. (Lodgment No. 2, vol. 6 at 1441.) He had a
13 Bachelor of Science degree in electrical engineering and a Masters of Business
14 Administration. (*Id.*) At the time of trial, he was doing graduate work in wireless
15 communication in pursuit of a master’s degree in telecommunications. (*Id.*) He
16 worked in data communications for Exxon, Bell South Communications which later
17 became AT&T, Northern Telecom, and for the preceding thirteen years owned his own
18 engineering firm. (*Id.* at 1442.) As part of his business, he acted as a liaison between
19 wireless communications companies and municipalities for the erection of cell towers
20 and for private companies who had communication interference issues. (*Id.* at 1444.)
21 He also held a number of professional licenses related to his work and had attended
22 various industry training courses. (*Id.* at 1444-45.) Finally, Snavelly discussed some
23 papers he had published on the topic of wireless engineering. (*Id.* at 1445-47.)

24 The prosecutor was well within appropriate bounds when he asked the jury to
25 compare the education and experience of these two experts when they evaluated their
26 testimony, and there was plenty of information presented to the jury for them to base
27 this comparison on. In any event, even if the prosecutor’s statement was improper, it
28 did not “so infect . . . the trial with unfairness as to make the resulting conviction a

1 denial of due process.” *Darden*, 477 U.S. at 181. The evidence of Potts’ guilt, though
 2 circumstantial, was significant. Accordingly, after an independent review of the record,
 3 the Court concludes the state court’s denial of this claim was neither contrary to, nor
 4 an unreasonable application of, clearly established Supreme Court law. *Himes*, 336
 5 F.3d at 853. Potts is not entitled to relief as to this claim.

6 D. *Ineffective Assistance of Trial Counsel (claim two)*

7 Potts argues his trial attorney was ineffective for five reasons. First, he contends
 8 trial counsel “failed to examine the physical evidence which established the basis of
 9 the Third-Party Culpability defense.” (Pet. at 4, 29-50, ECF No. 1.) Second, he claims
 10 counsel “failed to produce evidence promised in his opening statement.” (*Id.*) Third,
 11 he argues counsel “knowingly lied to the jury during closing argument.” (*Id.*) Fourth,
 12 he contends counsel failed to object to the prosecutor vouching for witness McColl
 13 during closing argument. (*Id.*) And fifth, Potts contends the cumulative effect of
 14 counsel’s errors resulted in counsel rendering ineffective assistance. (*Id.* at 50.)
 15 Respondent argues the state court’s denial of these claims was neither contrary to, nor
 16 an unreasonable application of, clearly established Supreme Court law. (Mem. of P.
 17 & A. Supp. Answer at 11-15, ECF No. 16.)

18 To establish ineffective assistance of counsel, a petitioner must first show his
 19 attorney’s representation fell below an objective standard of reasonableness. *Strickland*
 20 *v. Washington*, 466 U.S. 668, 688 (1984). “This requires showing that counsel made
 21 errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the
 22 defendant by the Sixth Amendment.” *Id.* at 687. He must also show he was prejudiced
 23 by counsel’s errors. *Id.* at 694. Prejudice can be demonstrated by a showing that “there
 24 is a reasonable probability that, but for counsel’s unprofessional errors, the result of the
 25 proceeding would have been different. A reasonable probability is a probability
 26 sufficient to undermine confidence in the outcome.” *Id.*; *see also Fretwell v. Lockhart*,
 27 506 U.S. 364, 372 (1993). Further, *Strickland* requires that “[j]udicial scrutiny of
 28 counsel’s performance . . . be highly deferential.” *Strickland*, 466 U.S. at 689. There

1 is a “strong presumption that counsel’s conduct falls within a wide range of reasonable
 2 professional assistance.” *Id.* at 686-87. The Court need not address both the deficiency
 3 prong and the prejudice prong if the defendant fails to make a sufficient showing of
 4 either one. *Id.* at 697.

5 “Surmounting *Strickland*’s high bar is never an easy task.” *Padilla v. Kentucky*,
 6 559 U.S. 356, 371 (2010). “The standards created by *Strickland* and section 2254(d)
 7 are both highly deferential and when the two apply in tandem, review is ‘doubly’ so.”
 8 *Harrington v. Richter*, 562 U.S. ___, 131 S. Ct. 770, 788 (2011) (citations omitted).
 9 These standards are “difficult to meet” and “demand[] that state court decisions be
 10 given the benefit of the doubt.” *Cullen v. Pinholster*, 563 U.S. ___, 131 S. Ct. 1388,
 11 1398 (2011). Federal habeas relief functions as a “guard against extreme malfunctions
 12 in the state criminal justice systems,” and not simply as a means of error correction.
 13 *Richter*, 131 S.Ct. at 786, quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979).
 14 “Representation is constitutionally ineffective only if it ‘so undermined the proper
 15 functioning of the adversarial process’ that the defendant was denied a fair trial.”
 16 *Strickland*, 466 U.S. at 687.

17 1. *Failure to Examine the Physical Evidence Supporting the Third Party*
 18 *Liability Defense*

19 Potts first argues trial counsel was ineffective when he failed to examine the
 20 clone of Vienneau’s phone before he based his defense on implicating Moen as the
 21 murderer. (Pet. at 29-41, ECF No. 1; Traverse at 9-12, ECF No. 21.) Had counsel
 22 examined the phone or hired an expert to do so, Potts argues, counsel would have
 23 discovered the message timing feature on Vienneau’s phone, and, having done so,
 24 would not have attempted the third party liability defense focusing on Moen. Instead,
 25 trial counsel would have either simply focused on raising a reasonable doubt as to
 26 Potts’ guilt or would have implicated an unnamed gang member who allegedly bragged
 27 about killing Vienneau and Dean. (Pet. at 29-41, 140, ECF No. 1; Traverse at 9-12,
 28 ECF No. 21.) Respondent counters that the state court’s denial of this claim was

1 Indeed, the apartment complex where Vienneau and Dean were
2 living was gated and secured. The apartment itself was located on the
3 third floor of the complex and there was a steep drop from the apartment
4 to the ground. Thus, to gain entrance to the apartment, the attacker likely
5 came through the front door, which had a working peephole. There was
6 also no sign of forced entry or a struggle between Vienneau and her
7 attacker.

8 As to the lack of any evidence of forced entry or struggle, police
9 noticed the only furniture displaced in the living room was a child's stool.
10 Tricia testified that from inside her bedroom with her door closed, she
11 typically could hear conversations emanating from her sister's room
12 and/or the living room. The evidence in the record thus supports the
13 inference that if the attacker had surprised Vienneau and forced his way
14 inside the apartment, Tricia would have been awakened by the noise from
15 the attack and/or by Vienneau and her pleas for help.

16 Potts's theory that Vienneau was killed by a gang member also does
17 not account for the murder of Baby Dean, as noted by the trial court. At
18 the time of the attack, Dean was just 10 months old and was inside his
19 playpen in Autumn's room, away from the scene of the attack on his
20 mother. If, as the defense now contends, Vienneau was the victim of an
21 attempted sexual assault by a complete stranger, why then would her
22 attacker also kill Dean? Also, why would the attacker entered Autumn's
23 room, where Dean was located, but not enter[] Tricia's room where Tricia
24 was sleeping in front of her television? After all, a 10-month-old child
25 cannot testify in court or identify his mother's attacker, but Tricia
26 certainly could.

27 Potts's gang theory also does not explain why text messages
28 exchanged between Potts and Vienneau on the day she was murdered
were deleted from Vienneau's phone and why, ostensibly after she was
murdered, Moen continued to receive text messages from Vienneau's
phone, including a message that Dean was "sleeping like a dead dog." In
addition, the content of some of the messages Moen received from
Vienneau that Moen testified seemed "fishy" suggested the attacker knew
Vienneau and Moen were friends and/or in a relationship, which further
undermined the theory that Vienneau was killed by a complete stranger.

 In contrast, there is nothing in the record on appeal or in the
petition suggesting that at the time defense counsel allegedly erred by
focusing suspicion on Moen (see *Strickland v. Washington*, *supra*, 466
U.S. at p. 689 [an attorney's performance "requires that every effort be
made to eliminate the distorting effects of hindsight"]), the gang member
theory was even viable, much less a better option than the theory
involving Moen. The petition contains only vague statements by Potts's
former defense counsel about some alleged evidence involving an
unidentified gang member allegedly bragging about to some unidentified
third person about killing Vienneau and her son.

 Based on the complete absence of any evidence in the record on
appeal and in the petition showing Potts was prejudiced by his counsel's
(alleged) tactical blunder in focusing suspicion on Moen and not a
complete stranger, we reject Potts's claim he was denied effective
assistance of counsel.

1 Finally we conclude the overwhelming evidence of Potts's guilt
 2 allayed any prejudice Potts *may* have suffered from his counsel's (alleged)
 3 tactical error in blaming Moen and not a complete stranger for the
 murders. (Cf. *People v. Slaughter* (2002) 27 Cal.4th 1187, 1219; *People*
v. Ledesma (1987) 43 Cal.3d 171, 215-218.)

4 The evidence in the record shows, among other things, Potts was
 5 upset when Vienneau threatened to take him to court for paternity testing
 6 because she suspected (ultimately correctly) that Potts had tampered with
 7 the mail-in tests showing he was not Dean's father; Potts submitted Max's
 8 DNA for testing and not his own because Potts did not want to be the
 9 father of, or pay child support for, Dean; Potts had never told his parents
 10 or his fiancé about Vienneau, Dean and the possibility that he could be
 11 Dean's father because Potts believed that if that were true, it would ruin
 12 his life; Potts conducted myriad searches on the Internet — which he
 13 unsuccessfully attempted to delete from his computer — concerning
 14 murder and getting away with murder, performing choke holds and
 15 knocking people unconscious; Vienneau told her mother, friends and
 16 roommates days before, and on the day, she was murdered she and Potts
 17 were having dinner that night; a few days before her murder, Vienneau
 18 called Bohrer and asked Bohrer if she was available to babysit Dean on
 19 July 26 because Vienneau and Potts planned to have dinner together that
 20 evening; minutes before Vienneau's murder, Bohrer called and Vienneau
 21 confirmed she would be dropping off Dean shortly at Bohrer's apartment;
 22 on the night of her murder, Vienneau intended in "no uncertain terms" to
 23 tell Potts she would be seeking a court-ordered paternity test to determine
 24 if Potts was Dean's father; on the day she was murdered, Vienneau and
 25 Potts exchanged 26 text messages, including several messages shortly
 26 before Vienneau was murdered; in some of these messages — including
 27 those recovered by experts from Vienneau's cell phone sent from Potts's
 28 phone — he inquired of Vienneau whether she was alone in the apartment;
 before police confronted Potts with the cell phone evidence, Potts
 maintained he had not texted Vienneau on the day she was murdered and
 he had received only one message from Vienneau that same day; hours
 before she was murdered, Vienneau texted Potts confirming their dinner
 plans that evening and stating she was excited about the "surprise" Potts
 promised her; records show Potts called Vienneau's cell phone shortly
 before the murders; the cell tower evidence supports the finding that at
 6:44 p.m. on the night of the murders, Potts was not at Max's residence;
 after the murders, Potts downloaded to his computer about 20 pages of
 cell phone records and altered on page 17 of those records *only* two
 entries concerning calls at 5:39 and 6:44 p.m. on the night Vienneau was
 murdered; Potts told police during police interviews that before her
 murder, Vienneau and not Potts had cancelled their tentative plans to see
 each other; on the day she was murdered, Vienneau asked her mother if
 the clothes Vienneau intended to wear to dinner with Potts that evening
 were appropriate; and Potts claimed he went to Max's house between 5:00
 and 8:00 p.m. on the night Vienneau was murdered because his own
 computer lacked software to view surveillance video taken of the Potts
 family home (in connection with newspapers being stolen from the
 house), even though Potts's computer had software installed on it that
 could view the video and was superior to the software available to Max.

On this record, we conclude there was no "reasonable probability"
 that, but for defense counsel's alleged deficiency in failing to have an

1 expert examine Vienneau's cell phone before the defense accused Moen
2 of the murders, the result would have been more favorable to Potts. (See
3 *People v. Vines, supra*, 51 Cal.4th at pp. 875-876.) As such, we conclude
Potts failed to establish the requisite prejudice for purposes of his claim
of ineffective assistance of counsel.

4 (Lodgment No. 6 at 37-42.)

5 Potts argues counsel should have examined Vienneau's phone before mounting
6 the third party liability defense, and his failure to conduct a reasonable investigation
7 of the basis for the defense violated *Strickland*. As *Strickland* notes, however, every
8 effort must be made "to reconstruct the circumstances of counsel's challenged conduct,
9 and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466
10 U.S. at 689. In Potts' case, counsel was confronted with an extremely difficult set of
11 facts pointing to Potts' guilt. Potts admitted he had had a sexual relationship with
12 Vienneau, had hidden his relationship with Vienneau from his parents and fiancé, and
13 had faked two paternity tests. (Lodgment No. 2, vol. 9 at 1711-23.) This provided a
14 motive for the murders, particularly the murder of Dean who could not have identified
15 Vienneau's killer and who a stranger would not have necessarily known was in the
16 other room. Cell tower evidence showed Potts was near Vienneau's apartment at the
17 time the murders were committed, contrary to his claim that he was at his friend Max
18 Corn's house, which provided opportunity. (Lodgment No. 2, vol. 7 at 1230.)
19 Evidence also established Potts had attempted to eliminate evidence implicating him
20 in the murders, which tended to show consciousness of guilt. Potts altered cell phone
21 records to show he was at Corn's house, not Vienneau's apartment, at the time of the
22 murders. (*Id.* at 1304-10.) Potts also deleted text messages between himself and
23 Vienneau that contradicted his statements to police, and attempted to delete internet
24 searches about getting away with murder, knocking people unconscious, avoiding child
25 support, and using a choke hold. (Lodgment No. 2, vol. 6 at 1108-13, 1140-43.) The
26 text messages, in which Potts asked Vienneau if she was alone, and the computer
27 searches also indicated planning of the murders. Finally, the fact that there was no
28

1 evidence of a struggle or forced entry into Vienneau's apartment indicated Vienneau
2 knew her killer. (Lodgment No. 2, vol. 4 at 477-502, 511-12.)

3 These facts severely narrowed the possible defenses counsel could have
4 mounted, and under the circumstances, focusing on Moen as the killer was a sound
5 strategic decision. Moreover, there was evidence supporting this choice. Witnesses
6 testified Moen was in love with Vienneau and that Vienneau may not have reciprocated
7 Moen's feelings. (Lodgment No. 2, vol. 9 at 1685-89.) Sperm matching Moen's DNA
8 was found inside Vienneau's vagina. (Lodgment No. 2, vol. 4 at 602-03.) Moen
9 admitted he had left work for a short period of time around the time the murders were
10 committed, and the surveillance tape at Moen's work was not turned on until 6:40 p.m.,
11 sometime after the murders likely took place. (Lodgment No. 2, vol. 5 at 677, 734.)
12 The one stumbling block was the text messages sent from Vienneau's phone to Moen
13 which occurred after the murders took place and which Moen was seen reading on the
14 surveillance video tape from his workplace. But counsel reasonably proceeded with
15 the third party liability defense focused on Moen anyway, because based on discovery
16 provided by the prosecution, counsel determined the prosecutor could not firmly
17 establish what time the text messages were *sent* from Vienneau's phone, only when
18 Moen read the messages. *Richter* helps place counsel's decision to move ahead with
19 the Moen third party liability defense based on these facts in perspective:

20 Representation is constitutionally ineffective only if it 'so undermined the
21 proper functioning of the adversarial process' that the defendant was
22 denied a fair trial. *Strickland, supra*, at 686 [citation omitted]. Just as
23 there is no expectation that competent counsel will be a flawless strategist
or tactician, an attorney may not be faulted for a reasonable miscalculation
or lack of foresight or for failing to prepare for what appear to be remote
possibilities.

24 Here, Richter's attorney was mistaken in thinking the prosecution
25 would not present forensic testimony. But the prosecution itself did not
26 expect to make that presentation and had made no preparations for doing
27 so on the eve of trial. For this reason alone, it is at least debatable
whether counsel's error was so fundamental as to call the fairness of the
trial into doubt.

28 *Richter*, 131 S.Ct. at 791.

1 Similarly, trial counsel in Potts' case was mistaken in believing the prosecutor
2 could not prove when the text messages were sent from Vienneau's phone, and indeed
3 the prosecutor himself was unaware of this evidence until counsel mounted a vigorous
4 presentation on behalf of Potts. As in *Richter*, "[f]or this reason alone, it is at least
5 debatable whether counsel's error was so fundamental as to call the fairness of the trial
6 into doubt." *Id.*

7 Potts frames the inquiry as follows: Did trial counsel reasonably rely on the
8 prosecution's evaluation of Vienneau's phone instead of conducting his own
9 investigation? But one must also ask: What would counsel have discovered had he
10 conducted his own investigation and what would he have been able to do with that
11 information? Had a defense expert examined Vienneau's phone he may have
12 discovered, before the prosecution did, the feature which recorded when text messages
13 were sent. (Pet. at 40, ECF No. 1.) But the discovery of the message timing feature on
14 Vienneau's phone would not have assisted Potts; rather it would have, *if also*
15 *discovered by the prosecution*, cut against Potts' only viable defense. The prosecution
16 had every incentive to thoroughly investigate the phone's messaging capabilities and
17 discover the message timing feature. Counsel's decision to rely on the prosecution's
18 investigation of the phone was reasonable under the circumstances. As the Supreme
19 Court has noted, "[t]he question 'is not whether a federal court believes the state
20 court's determination' under the *Strickland* standard 'was incorrect but whether that
21 determination was unreasonable — a substantially higher threshold.'" *Knowles v.*
22 *Mirzayance*, 556 U.S. 111, 123 (2009) (quoting *Schriro v. Landrigan*, 550 U.S. 465,
23 473 (2007)). Thus, the question is not "whether counsel's actions were reasonable" but
24 "whether there is any reasonable argument that counsel satisfied *Strickland*'s
25 deferential standard." *Hibler v. Benedetti*, 693 F.3d 1140, 1150 (9th Cir. 2012)
26 (quoting *Richter*, 131 S.Ct. at 788). "Accordingly, a 'doubly deferential judicial
27 review' applies to *Strickland* claims rejected by the state court." *Id.* (quoting *Knowles*
28 *v. Mirzayance*, 556 U.S. 111, 123 (2009)). Here, Potts has not established that there was

1 no reasonable argument in support of the state court's determination with respect to
2 effective assistance of counsel.

3 Potts has not satisfied the prejudice prong of *Strickland* for the same reason.
4 Potts claims that had counsel discovered the message timing feature of Vienneau's
5 phone he would have abandoned his focus on Moen and elected instead to either
6 simply raise a reasonable doubt about Potts' guilt or argue an unnamed gang member
7 murdered Vienneau and Dean. (Pet. at 40-42, ECF No. 1.) Potts has submitted a
8 declaration from trial counsel in support of the petition stating that "[i]n the discovery
9 provided to me by the District Attorney's office long before trial, I learned that a gang
10 member who lived somewhat near to Tori V's apartment had bragged to at least one
11 other person about killing Tori and Dean shortly after the murders." (*Id.* at 140.) Potts
12 claims had counsel discovered the message timing feature of Vienneau's phone and
13 altered his defense theory, "[i]t is reasonably probable the jury would have either
14 believed the evidence regarding the gang member, or that at least one juror would have
15 not been convinced of Petitioner's guilt beyond a reasonable doubt." (*Id.* at 41.) As
16 detailed above and by the state appellate court, the evidence of Potts' guilt, although
17 circumstantial, was quite strong. After hiding his relationship with Vienneau from his
18 family and fiancé, Potts faked two paternity tests in an effort to avoid responsibility for
19 his paternity of Dean. (Lodgment No. 2, vol. 9 at 1720-23.) When Vienneau suspected
20 Potts had faked the tests, she told Potts, friends and family she planned on taking him
21 to court for a court ordered paternity test. (Lodgment No. 2, vol. 3 at 314, 415.) Potts
22 was very angry and upset about Vienneau's intent to take him to court. (*Id.* at 369,
23 416-17.) Vienneau's mother testified Vienneau told her Potts' life would be "ruined"
24 if the truth about she and Dean were revealed. (Lodgment No. 2, vol. 9 at 1695.)
25 Shortly before Vienneau's murder, Potts conducted searches on his computer for topics
26 including "getting away with murder," "knocking someone unconscious," "avoiding
27 child support," and "using a choke hold"; Potts then tried to delete those searches from
28 his computer. (Lodgment No. 2, vol. 6 at 1140-43.) Potts claimed to be at his friend

1 Max Corn's house during the murder, but cell phone records indicated his phone
2 "pinged" off a tower only .6 miles from Vienneau's apartment at approximately the
3 time the murders were committed. (Lodgment No. 2, vol. 7 at 1304-10.) Text
4 messages between Potts and Vienneau sent and received just prior to the murders
5 during which Potts' and Vienneau's plans for the evening of the murders were
6 discussed were deleted from Vienneau's phone, and Potts asked Vienneau in several
7 of these texts whether she was alone. (Lodgment No. 2, vol. 6 at 1108-13.) Vienneau
8 told her mother and friends she planned to have dinner with Potts the night of her
9 murder to discuss and a court-ordered paternity test. (Lodgment No. 2, vol. 3 at 312,
10 417-20, vol. 9 at 1694.)

11 There was no evidence of forced entry into the apartment nor evidence of a
12 struggle inside the apartment, nor did Vienneau's roommate awaken during the murder,
13 suggesting Vienneau knew her killer and therefore the killer was not the unnamed gang
14 member. (Lodgment No. 2, vol. 4 at 477-502, 511-12.) In addition, the murder of
15 Dean was consistent with Potts' desire to rid himself of Vienneau and their son, as a
16 stranger would not have known Dean was in the other room, nor would he have been
17 likely to kill Dean as Dean could not have identified the killer. After the murders, Potts
18 attempted to alter his cell phone records to show the call which pinged off the cell
19 tower close to Vienneau's apartment instead pinged off the cell tower close to Corn's
20 house, consistent with his alibi. (Lodgment No. 2, vol. 7 at 1230.) One of the text
21 messages Moen thought was suspicious and police thought was sent by the killer,
22 which stated "Duh" in response to Moen's text, was similar to a text response from
23 Potts which Potts deleted from Vienneau's phone. (Lodgment No. 2, vol. 3 at 694-95,
24 vol. 6 at 1143.) Potts also lied to the police about the paternity issue and his
25 relationship with Vienneau. (Lodgment No. 2, vol. 6 at 1002-16.)

26 In short, Potts had a clear motive and opportunity to commit the murders,
27 attempted to destroy and alter evidence indicative of his guilt, and lied to police about
28 his contact with Vienneau and the paternity tests he faked when questioned about

1 Vienneau's murder. It is not reasonably probable the jury would have found Potts not
2 guilty, or that they would not have been convinced of his guilt beyond a reasonable
3 doubt, had counsel presented a third party liability defense focused on the unnamed
4 gang member as the perpetrator of the murders. *Strickland*, 466 U.S. at 697.
5 Accordingly, the state court's denial of this claim was neither contrary to, nor an
6 unreasonable application of, clearly established Supreme Court law. *Williams*, 529
7 U.S. at 412-13. Potts is not entitled to relief as to this claim.

8 2. *Failure to Produce Evidence as Promised in Opening Statement*

9 Potts next faults counsel for "assur[ing] the jury members that the defense would
10 show them — in the course of the proceedings — that Daniel Moen had [a] clear
11 opportunity to commit the double homicide [which] placed an unnecessary affirmative
12 duty upon the shoulders of his defense to produce such." (Pet. at 43, ECF No. 1.)
13 Respondent argues the state court's rejection of this claim was neither contrary to, nor
14 an unreasonable application of, clearly established Supreme Court law. (Mem. of P.
15 & A. Supp. Answer at 13-14, ECF No. 16.)

16 Potts raised this claim only in the second habeas corpus petition he filed in the
17 California Supreme Court following the denial of his direct appeal. (Lodgment No. 9.)
18 The California Supreme Court denied the petition without citation of authority.
19 (Lodgment No. 10.) Thus, this Court must conduct an independent review of the
20 record to determine whether that denial was contrary to, or an unreasonable application
21 of, clearly established Supreme Court law. *Himes*, 336 F.3d at 853.

22 Counsel did not shift the burden of proof to the defense by outlining his defense
23 strategy in his opening statement as Potts suggests. As discussed above in section
24 IV(D)(1) of this Report and Recommendation, in the face of a large amount of
25 incriminating circumstantial evidence implicating Potts in the murders, counsel
26 reasonably made a strategic decision to implicate Moen as the killer instead. As
27 *Strickland* notes, every effort must be made "to reconstruct the circumstances of
28 counsel's challenged conduct, and to evaluate the conduct from counsel's perspective

1 at the time.” *Strickland*, 466 U.S. at 689. By outlining the defense theory, counsel
2 simply did what all lawyers do in opening statements, that is, provide a road map to the
3 jury as how counsel believes the evidence will be presented and what counsel believes
4 the evidence will show. The fact that new evidence came to light mid-trial which
5 called into question the defense theory does not render counsel’s performance
6 ineffective. *Strickland*, 466 U.S. at 687.

7 Potts also has not established he was prejudiced by any actions of counsel
8 because he has not shown “there is a reasonable probability that, but for counsel’s
9 unprofessional errors, the result of the proceeding would have been different. A
10 reasonable probability is a probability sufficient to undermine confidence in the
11 outcome.” *Id.* at 694; *see also Fretwell*, 506 U.S. at 372. Potts has provided no
12 evidence showing that, had counsel not forcefully asserted that Moen had the
13 opportunity to commit the murders, the jury would have come to a different conclusion
14 about his guilt. *Strickland*, 466 U.S. at 694.

15 Following an independent review of the record, the Court concludes the state
16 court’s rejection of this claim was neither contrary to, nor an unreasonable application
17 of, clearly established Supreme Court law. *Himes*, 336 F.3d at 853. Accordingly, Potts
18 is not entitled to relief as to this claim.

19 3. *Knowingly Lying to the Jury During Closing Argument*

20 Potts next contends counsel lied to the jury during closing argument.
21 Specifically, Potts complains that counsel continued to pursue the theory that Moen
22 could have committed the murders despite the text message timing evidence which
23 showed Moen on video tape at his workplace shortly after the murders were committed.
24 (Pet. at 45-50, ECF No. 1.) According to Potts, this damaged the credibility of the
25 defense irreparably because it essentially asked the jury to “abandon all common-sense,
26 ignore the newly-introduced evidence of which they had been shown, and find it
27 plausible Mr. Moen had nonetheless been the likely killer of Tori and Dean.” (*Id.* at
28 47.) Respondent counters the state court’s denial of this claim was neither contrary to,

1 nor an unreasonable application of, clearly established Supreme Court law. (Mem. of
2 P. & A. Supp. Answer at 14, ECF No. 16.)

3 Potts raised this claim only in the second habeas corpus petition he filed in the
4 California Supreme Court following the denial of his direct appeal. (Lodgment No. 9.)
5 The California Supreme Court denied the petition without citation of authority.
6 (Lodgment No. 10.) Thus, this Court must conduct an independent review of the
7 record to determine whether that denial was contrary to, or an unreasonable application
8 of, clearly established Supreme Court law. *Himes*, 336 F.3d at 853.

9 Potts contends counsel should have responded to the newly discovered evidence
10 by emphasizing Potts' alibi defense instead of continuing to insist that Moen had the
11 opportunity and motive to kill Vienneau and Dean. (Pet. at 47, ECF No. 1.) But the
12 alibi defense had problems as well, notably, the cell tower "pings" which showed Potts
13 was near Vienneau's apartment at the time of the murders and not Corn's house.
14 (Lodgment No. 2, vol. 7 at 1216-19, 1230.) The incriminatory nature of the cell tower
15 evidence was compounded by Potts' attempts to alter his cell phone records to support
16 his alibi, as well as the deleted texts from Vienneau's phone which established Potts
17 and Vienneau had plans the night of the murders and Potts' attempt to determine
18 whether she was alone. (Lodgment No. 2, vol. 6 at 1143-44; vol. 7 at 1304-12.) Under
19 these circumstances, it was a reasonable, strategic decision for counsel to forge ahead
20 with the defense theory about Moen. *Strickland*, 466 U.S. at 688.

21 In any event, Potts has not established he was prejudiced by counsel's actions.
22 *Id.* at 693-94. As set forth more fully above, the circumstantial evidence against Potts
23 was strong. He had a strong motive to kill Vienneau *and* their son, and in fact, no other
24 plausible person had the motive to kill the baby. Potts' actions showed a consciousness
25 of guilt, specifically, lying about the paternity tests, altering his cell phone records,
26 deleting his incriminating computer searches, and deleting texts between he and
27 Vienneau. The evidence also showed Potts had the opportunity to commit the murders,
28 including the evidence that his cell phone "pinged" off a cell tower near Vienneau's

1 apartment at the time the murders were committed. In short, given the evidence
2 presented to the jury, had counsel emphasized Potts' alibi or suggested some other
3 individual besides Moen or Potts was the murderer, the Court is confident jury's verdict
4 would have been the same.

5 Accordingly, after an independent review of the record, the Court concludes the
6 state court's denial of this claim was neither contrary to, nor an unreasonable
7 application of, clearly established Supreme Court law. *Himes*, 336 F.3d at 853. Potts
8 is not entitled to relief as to this claim.

9 4. *Failure to Object to Prosecutor's Vouching for the Credibility of a Witness*

10 Finally, Potts contends trial counsel was ineffective when he failed to object to
11 the prosecutor vouching for the prosecution's cell tower expert, McColl. (Pet. at 5, 31,
12 48-50, ECF No. 1.) Respondent argues the state court's denial of this claim was neither
13 contrary to, nor an unreasonable application of, clearly established Supreme Court law.
14 (Mem. of P. & A. Supp. of Answer at 13-15, ECF No. 16.)

15 Potts raised this claim only in the second habeas corpus petition he filed in the
16 California Supreme Court following the denial of his direct appeal. (Lodgment No. 9.)
17 The California Supreme Court denied the petition without citation of authority.
18 (Lodgment No. 10.) Thus, this Court must conduct an independent review of the
19 record to determine whether that denial was contrary to, or an unreasonable application
20 of, clearly established Supreme Court law. *Himes*, 336 F.3d at 853.

21 As discussed in section IV(C) of this R&R, the Court has concluded the
22 prosecutor did not vouch for the credibility of his expert witness. As such, trial counsel
23 was not ineffective for failing to object. Potts has neither established counsel was
24 ineffective, because there was no basis for an objection, nor that he was prejudiced by
25 counsel's failure, because he has not shown that had counsel made the objection it
26 would have affected the outcome of his case. *Strickland*, 466 U.S. at 688, 697.
27 Accordingly, Potts is not entitled to relief as to this claim. *Himes*, 336 F.3d at 853.

28 //

1 5. *Cumulative Ineffective Assistance of Counsel*

2 On page 50 of his petition, Potts argues that “even if any individual error raised
3 herein does not rise to the level of ineffective assistance sufficient to grant the relief
4 sought, then cumulatively the errors do.” (Pet. at 50, ECF No. 1.) This claim has never
5 been presented to any state court, which would normally preclude review. *See Rose v.*
6 *Lundy*, 455 U.S. 509, 522 (1982). It is clear, however, that were Potts to present the
7 claim to the California Supreme Court in a habeas corpus petition, the state court would
8 reject it as untimely. *See In re Robbins*, 18 Cal. 4th 770, 814-15 (1998). In cases like
9 these, the Ninth Circuit has held such claims are “technically exhausted,” but
10 procedurally defaulted if the procedural rule that would be imposed is independent and
11 adequate. *Cooper v. Neven*, 641 F.3d 322, 327 (9th Cir. 2011). The United States
12 Supreme Court found California’s timeliness rule independent and adequate in *Walker*
13 *v. Martin*, 562 U.S. ___, 131 S. Ct. 1120, 1128 (2011). Accordingly, the Court
14 concludes Potts’ claim of cumulative ineffective assistance of counsel is technically
15 exhausted. The claim is, however, procedurally defaulted under *Robbins* unless Potts
16 can establish cause for the default and prejudice resulting from it, or that “failure to
17 consider the claims will result in a fundamental miscarriage of justice.” *Coleman v.*
18 *Thompson*, 501 U.S. 722, 750 (1991).

19 Established precedent in this Circuit dictates that a court’s decision on the issue
20 of procedural default is to be informed by furthering “the interests of comity,
21 federalism, and judicial efficiency.” *Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir.
22 1998). Thus where, as here, deciding the merits of a claim proves to be less
23 complicated and less time-consuming than adjudicating the issue of procedural default,
24 a court may exercise discretion in its management of the case to reject the claims on
25 their merits and forgo an analysis of cause and prejudice. *Batchelor v. Cupp*, 693 F.2d
26 859, 864 (9th Cir. 1982). Because there is no state court decision on this claim to
27 which this Court can defer, the Court must conduct a *de novo* review of the claim.
28 *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2003).

“Cumulative error applies where, ‘although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant.’” *Mancuso v. Olivarez*, 292 F.3d 939, 958 (9th Cir. 2002) (quoting *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996)). The Court concluded in section IV(D) of this Report and Recommendation that counsel did not render ineffective assistance. Because the Court has concluded no errors occurred, no cumulative error occurred. The Court has also considered the cumulative impact of counsel’s decisions and finds no prejudice. *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986) (stating that “[i]t will generally be appropriate for a reviewing court to assess counsel’s overall performance throughout the case in order to determine whether the ‘identified acts of omissions’ overcome th presumption that a counsel rendered reasonable professional assistance”) (quoting *Strickland*, 466 U.S. at 689.) Accordingly, he is not entitled to relief as to this claim.

E. *Ineffective Assistance of Appellate Counsel (claim three)*

In claim three, Potts alleges appellate counsel rendered ineffective assistance in two ways. First, Potts contends appellate counsel should have alleged trial counsel was ineffective when he failed to produce evidence that Moen killed Vienneau and Dean despite having promised to do so in his opening statement. Second, Potts argues appellate counsel should have alleged trial counsel was ineffective when he failed to object to the prosecution’s vouching for McColl during closing argument. (Pet. at 5, 51-54, ECF No. 1.) Respondent counters that the state court’s rejection of this claim was neither contrary to nor an unreasonable application of, clearly established Supreme Court law. (Mem. of P. & A. Supp. Answer at 15-17, ECF No. 16.)

Potts raised these claims only in the second habeas corpus petition he filed in the California Supreme Court following the denial of his direct appeal. (Lodgment No. 9 at 4, 23-27.) The California Supreme Court denied the petition without citation of authority. (Lodgment No. 10.) Accordingly, this Court must conduct an independent review of the record to determine whether that denial was contrary to, or an

1 unreasonable application of, clearly established Supreme Court law. *Himes*, 336 F.3d
2 at 853.

3 The *Strickland* test applies to ineffective assistance of appellate counsel claims.
4 *Smith v. Robbins*, 528 U.S. 259, 285 (2000) (citing *Smith v. Murray*, 477 U.S. 527,
5 535-36 (1986)). A petitioner must first show that his appellate counsel's performance
6 fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. He
7 must then establish he was prejudiced by counsel's errors. *Id.* at 694. To establish
8 prejudice, a petitioner must demonstrate that he would have prevailed on appeal absent
9 counsel's errors. *Smith*, 528 U.S. at 285. Appellate counsel is not required to raise
10 frivolous or meritless claims on appeal. *Jones v. Ryan*, 691 F.3d 1093, 1101 (9th Cir.
11 2012).

12 As to Potts' first claim of error — that appellate counsel should have alleged trial
13 counsel was ineffective when he failed to produce evidence that Moen committed the
14 murders, as promised in his opening statement — this Court has already determined in
15 section IV(D)(3) of this Report and Recommendation that trial counsel was not
16 ineffective when he failed to produce evidence promised during opening statement.
17 Accordingly, appellate counsel's failure to present that claim was not objectively
18 unreasonable because it had no merit. *Jones*, 691 F.3d at 1101. In addition, Potts has
19 not established he was prejudiced by appellate counsel's failure to present because he
20 has not shown he would have prevailed on that issue on appeal had it been presented.
21 *Smith*, 528 U.S. at 285.

22 With regard to Pott's claim that appellate counsel should have alleged that trial
23 counsel was ineffective when he failed to object to statements made by the prosecutor
24 during closing argument as improper vouching, as this Court concluded in section
25 IV(D)(4) the prosecutor's statements were not vouching. Therefore, trial counsel was
26 not ineffective for failing to object, and Potts was not prejudiced by counsel's failure
27 to object. *Strickland*, 466 U.S. at 688, 694. Thus, appellate counsel cannot be faulted
28 for failing to raise this claim. *Jones*, 691 F.3d at 1101.

1 For all the foregoing reasons, the state court's denial of this claim was neither
 2 contrary to, nor an unreasonable application of, clearly established Supreme Court law.
 3 *Williams*, 529 U.S. at 412-13. Potts is not entitled to relief as to this claim.

4 F. *Evidentiary Hearing*

5 On page 62 of Potts' petition, he asks this Court to conduct an evidentiary
 6 hearing on his claims. (Pet. 62, ECF No. 1.) Evidentiary hearings in § 2254 cases are
 7 governed by AEDPA, which "substantially restricts the district court's discretion to
 8 grant an evidentiary hearing." *Baja v. Ducharme*, 187 F.3d 1075, 1077 (9th Cir. 1999).
 9 The provisions of 28 U.S.C. § 2254(e)(2) control this decision:

10 (2) If the applicant has failed to develop the factual basis of a claim
 11 in State court proceedings, the court shall not hold an evidentiary hearing
 on the claim unless the applicant shows that –

12 (A) the claim relies on –

13 (i) a new rule of constitutional law, made retroactive
 14 to cases on collateral review by the Supreme Court, that was
 previously unavailable; or

15 (ii) a factual predicate that could not have been
 16 previously discovered through the exercise of due diligence;
 and

17 (B) the facts underlying the claim would be sufficient to establish
 18 by clear and convincing evidence that but for the constitutional error, no
 reasonable factfinder would have found the applicant guilty of the
 underlying offense.

19
 20 28 U.S.C.A. § 2254(e)(2) (West 2006).

21 In order to determine whether to grant an evidentiary hearing, the court must first
 22 "determine whether a factual basis exists in the record to support the petitioner's
 23 claim." *Insyxiengmay v. Morgan*, 403 F.3d 657, 669 (9th Cir. 2005) (citing *Baja*, 187
 24 F.3d at 1078). If not, the court must "ascertain whether the petitioner has 'failed to
 25 develop the factual basis of the claim in State court.'" *Id.* at 669-70. A failure to
 26 develop the factual basis of a claim in state court implies "some lack of diligence, or
 27 some greater fault, attributable to the prisoner or the prisoner's counsel." *See Williams*
 28 *v. Taylor*, 529 U.S. 420, 432 (2000). The Supreme Court has said that "[d]iligence will

1 require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing
2 in state court in the manner prescribed by state law.” *Id.* at 437.

3 Pursuant to *Cullen v. Pinholster*, 563 U.S. ___, 131 S. Ct. 1388, 1402 (2011),
4 Potts is limited to the facts presented to the state court. In *Pinholster*, the Supreme
5 Court held that where habeas claims have been decided on their merits in state court,
6 a federal court’s review must be confined to the record that was before the state court.
7 *Id.* at 1398. Potts can only proceed to develop additional evidence in federal court if
8 either § 2254(d)(1) or (d)(2) is first satisfied. *See Sully v. Ayers*, 725 F.3d 1057, 1076
9 (9th Cir. 2013) (stating that “an evidentiary hearing is pointless once the district court
10 has determined that § 2254(d) precludes habeas relief” and citing *Pinholster*, 131 S.Ct.
11 at 1411, n. 20). It has not been here for all the reasons discussed above. Accordingly,
12 the Court recommends Potts’ request for an evidentiary hearing be **DENIED**.

13 G. Request to Appoint Counsel

14 Potts also asks to be appointed counsel. (Pet. at 62, ECF No. 1.) The Sixth
15 Amendment right to counsel does not extend to federal habeas corpus actions by state
16 prisoners. *McCleskey v. Zant*, 499 U.S. 467, 495 (1991); *Chaney v. Lewis*, 801 F.2d
17 1191, 1196 (9th Cir. 1986); *Knaubert v. Goldsmith*, 791 F.2d 722, 728 (9th Cir. 1986).
18 However, financially eligible habeas petitioners seeking relief pursuant to 28 U.S.C.
19 § 2254 may obtain representation whenever the court “determines that the interests of
20 justice so require.” 18 U.S.C. § 3006A(a)(2)(B) (West Supp. 2007); *Terrovona v.*
21 *Kincheloe*, 912 F.2d 1176, 1181 (9th Cir. 1990); *Bashor v. Risley*, 730 F.2d 1228, 1234
22 (9th Cir. 1984).

23 The appointment of counsel is discretionary when no evidentiary hearing is
24 necessary. *Terrovona*, 912 F.2d at 1177; *Knaubert*, 791 F.2d at 728. In the Ninth
25 Circuit, “[i]ndigent state prisoners applying for habeas relief are not entitled to
26 appointed counsel unless the circumstances of a particular case indicate that appointed
27 counsel is necessary to prevent due process violations.” *Chaney*, 801 F.2d at 1196;
28 *Knaubert*, 791 F.2d at 728-29. Factors to be considered are the likelihood of success

1 on the merits and whether the issues involved are too complex for the petitioner.
2 *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983). In addition, the appointment of
3 counsel may be necessary if the petitioner has such limited education that he or she is
4 incapable of presenting his or her claims. *La Mere v. Risley*, 877 F.2d 622, 626 (9th
5 Cir. 1987). Here, Petitioner has sufficiently represented himself to date. From the face
6 of the petition, filed pro se, it appears that Petitioner has a good grasp of this case and
7 the legal issues involved. Under such circumstances, a district court does not abuse its
8 discretion in denying a state prisoner's request for appointment of counsel as it is
9 simply not warranted by the interests of justice. *See id.* Accordingly the Court
10 **DENIES** the request for the appointment of counsel.

11 **V. CONCLUSION**

12 The Court submits this Report and Recommendation to United States District
13 Judge Dana M. Sabraw under 28 U.S.C. § 636(b)(1) and Local Civil Rule 72.1(d)(4)
14 of the United States District Court for the Southern District of California. For the
15 reasons outlined above, the Court **DENIES** Petitioner's request for appointment of
16 counsel.

17 In addition, **IT IS HEREBY RECOMMENDED** that the Court issue an order:
18 (1) approving and adopting this Report and Recommendation, and (2) directing that
19 Judgment be entered **DENYING** the request for an evidentiary hearing and **DENYING**
20 Petition for Writ of Habeas Corpus.

21 **IT IS ORDERED** that no later than **August 29, 2014** any party to this action
22 may file written objections with the Court and serve a copy on all parties. The
23 document should be captioned "Objections to Report and Recommendation."

24 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with
25 the Court and served on all parties no later than **September 19, 2014**. The parties are
26 advised that failure to file objections within the specified time may waive the right to

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28 ///

1 raise those objections on appeal of the Court's order. *See Turner v. Duncan*, 158 F.3d
2 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153, 1156 (9th Cir. 1991).

3 **IT IS SO ORDERED.**

4
5 **DATED: August 7, 2014**

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7 **JILL L. BURKHARDT**
8 **United States Magistrate Judge**
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